Government of Malaysia v Mohd Najib bin Hj Abd Razak

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-21NCVC-35–06 OF 2019
AHMAD BACHE J
22 JULY 2020

Revenue Law — Income Tax — Recovery by government of taxes due and payable — Government applied for summary judgment ('SJ') on claim — Whether defendant could avoid SJ by showing triable issues — Whether court had no jurisdiction to determine any issue concerning validity or correctness of amount claimed — Whether only Special Commissioners of Income Tax ('SCIT') had power to determine such issues on appeal by taxpayer under s 99 of ITA — Whether any questions of law concerning SCIT's verdict were referable to High Court for determination by way of case stated — Whether s 106(3) of the ITA ('the ITA') was not unconstitutional vis a vis arts 13 or 121 of Federal Constitution — Income Tax Act 1967 s 106

The plaintiff applied for summary judgment of its claim for RM1,692,872,924.83 against the defendant being additional income tax together with penalties which the defendant had failed to pay for the years of assessment 2011 until 2017. The defendant resisted the application on the ground he was able to show several triable issues that warranted a full trial of the claim. Among those issues were that: (a) the defendant had, as Prime Minister and Finance Minister of Malaysia at the material time, received substantial donations from an Arab donor both for political and personal purposes and such donations were not taxable under the Income Tax Act 1967 ('the ITA'); (b) s 106(3) of the ITA — which precluded the court from entertaining any plea contesting the amount claimed — was unconstitutional vis a vis arts 13 and 121 of the Federal Constitution because it rendered the court powerless to question the validity of the claim and thereby resulted in the defendant being unjustly deprived of his property; (c) the amounts claimed by the plaintiff were statute-barred; and (d) the plaintiff failed to plead fraud, willful default or negligence pursuant to s 91(3) of the ITA for the years of assessment 2011 to 2013. The defendant had filed an appeal against the notices of assessments to the Special Commissioners of Income Tax ('the SCIT') pursuant to s 99 of the ITA.

Held, allowing the summary judgment application:

(1) The principle of law that the existence of triable issues would prevent summary judgment from being entered against a party had no operation in a suit by the government to recover unpaid taxes under s 106(1) of the

Income Tax Act 1967 ('the ITA'). This was because s 106(3) provided that in such a suit, the court could not entertain any plea that the amount of tax claimed was excessive, incorrectly assessed, under appeal or incorrectly increased (see paras 3–4).

(2) Since the notices of assessments (additional) in the present case were properly served on the defendant under s 103(2) of the ITA, the tax payable under those notices became due and payable to the plaintiff. This was compounded by the fact that the Director-General of Income Tax had also issued a certificate of indebtedness under s 142(1) of the ITA which was prima facie evidence that the claimed amount was the actual amount due and payable and it was sufficient authority for the court to give judgment for that amount (see paras 9 & 19–21).

(3) All the defences and pleas raised by the defendant were questions of fact which had to be addressed to and determined by the Special Commissioners of Income Tax ('SCIT') under s 99 of the ITA. The SCIT were the judges of facts who would decide whether the amount claimed was proper and also decide other issues such as limitation or whether there was fraud, willful default or negligence. These were not issues within the power of the court to decide (see paras 27–28 & 61–64).

(4) Section 106(3) of the ITA was not unconstitutional either for usurping the judicial power of the court under art 121 or for contravening art 13 of the Federal Constitution. Section 106(3) was merely a method of recovery. The taxpayer had to first exhaust his avenue of appeal to the SCIT pursuant to s 99 of the ITA and if there remained any further disputes on questions of law, they were referable to the High Court for determination by way of a case stated. Judicial power therefore still remained vested in the High Court to ultimately determine the correctness of the SCIT's decision (see paras 51–52 & 70).

[Bahasa Malaysia summary

Plaintif memohon untuk suatu penghakiman terus untuk tuntutannya sebanyak RM1,692,872,924.83 terhadap defendan sebagai penambahan cukai pendapatan berserta denda yang gagal dibayar oleh defendan bagi tahun taksiran 2011 hingga 2017. Defendan membantah permohonan tersebut dengan alasan bahawa beliau mampu untuk menunjukkan beberapa isu yang boleh dibicarakan yang memerlukan perbicaraan penuh bagi tuntutan tersebut. Antara isu-isu tersebut adalah: (a) defendan telah, sebagai Perdana Menteri dan Menteri Kewangan Malaysia pada waktu yang material, telah menerima sumbangan besar dari penderma Arab untuk tujuan politik dan peribadi dan sumbangan tersebut tidak dikenakan cukai di bawah Akta Cukai Pendapatan 1967 ('ACP'); (b) s 106(3) ACP — yang menghalang mahkamah daripada melayan sebarang pengakuan dalam menentang jumlah yang dituntut — adalah tidak mengikut perlembagaan berpandukan perkara 13 dan

121 Perlembagaan Persekutuan kerana ia menyebabkan Mahkamah tidak berkuasa dalam mempersoalkan kesahihan tuntutan tersebut dan dengan itu mengakibatkan defendan dihalang haknya secara tidak adil; (c) jumlah yang dituntut oleh plaintif bertentangan dengan undang-undang; dan (d) plaintif gagal memplidkan frod, keingkaran sengaja atau kecuaian berdasarkan s 91(3) ACP bagi tahun taksiran 2011 hingga 2013. Defendan telah memfailkan rayuan semasa terhadap notis taksiran kepada *Special Commissioners of Income Tax* ('SCIT') bersesuaian dengan s 99 ACP.

Diputuskan, membenarkan permohonan penghakiman terus:

(1) Prinsip undang-undang bahawa wujudnya isu yang boleh dibicarakan akan menghalang penghakiman terus terhadap sesuatu tidak akan berfungsi dalam tuntutan oleh kerajaan untuk mendapatkan kembali cukai yang belum dijelaskan berdasarkan s 106(1) Akta Cukai Pendapatan 1967 ('ACP'). Ini kerana s 106(3) memperuntukkan bahawa dalam tuntutan tersebut, Mahkamah tidak dapat melayan sebarang pengakuan bahawa jumlah cukai yang dituntut adalah berlebihan, disalah tafsirkan, di bawah rayuan atau meningkat secara tidak tepat (lihat perenggan 3–4).

(2) Oleh kerana notis penilaian (tambahan) dalam kes semasa diserahkan dengan sempurna kepada defendan di bawah s 103(2) ACP, cukai yang harus dibayar di bawah notis tersebut menjadi terhutang dan harus dibayar kepada plaintif. Ini diburukkan lagi dengan fakta bahawa Ketua Pengarah Cukai Pendapatan juga telah mengeluarkan perakuan keberhutangan di bawah s 142(1) ACP yang merupakan bukti prima facie bahawa jumlah yang dituntut adalah jumlah sebenar yang perlu dibayar dan perlu dibayar dan ianya adalah nas-nas yang mencukupi bagi mahkamah untuk memberikan penghakiman untuk jumlah tersebut (lihat perenggan 9 & 19–21).

(3) Kesemua pembelaan dan pengakuan yang dibangkitkan oleh defendan adalah persoalan fakta yang harus diputuskan dan ditentukan oleh Special Commissioners of Income Tax ('SCIT') berdasarkan s 99 ACP. SCIT adalah hakim kepada fakta yang akan memutuskan sama ada jumlah yang dituntut adalah wajar dan juga memutuskan isu-isu lain seperti had atau sama ada terdapat frod, keingkaran sengaja atau kecuaian. Ini bukanlah isu dalam bidang kuasa mahkamah untuk memutuskan (lihat perenggan 27–28 & 61–64).

(4) Seksyen 106(3) ACP tidak mengikut perlembagaan sama ada untuk mengatasi kuasa kehakiman mahkamah di bawah perkara 121 atau untuk melanggar perkara 13 Perlembagaan Persekutuan. Seksyen 106(3) hanyalah kaedah pemulihan. Pembayar cukai harus terlebih dahulu menghabiskan rayuannya ke SCIT berdasarkan s 99 ACP dan jika masih ada pertikaian lebih lanjut mengenai persoalan undang-undang, ianya

A boleh dirujuk ke Mahkamah Tinggi untuk ditentukan melalui kes seperti yang dinyatakan. Oleh itu, kuasa kehakiman masih berada pada Mahkamah Tinggi untuk akhirnya menentukan ketepatan keputusan SCIT (lihat perenggan 51–52 & 70).]

B **Cases referred to**

Arumugam Pillai v Government of Malaysia [1975] 2 MLJ 29, FC (refd)
Arumugam Pillai v Government of Malaysia [1980] 2 MLJ 283, FC (refd)
Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473; [1989] 1 CLJ Rep 9, SC (refd)
C
Government of Malaysia v Abdul Rahman [1975] 1 MLJ 276 (refd)
Government of Malaysia v Gan Chuan Lian and another action [1992] 1 MLJ 449; [1992] 2 CLJ Rep 424, HC (refd)
Government of Malaysia v Ng Song Choon [1975] 1 MLJ 131 (refd)
Infra Quest Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2017] 7 MLJ 35
D
Kerajaan Malaysia lwn Audio Video Solution System Sdn Bhd dan satu lagi [2017] MLJU 1118; [2017] 1 LNS 1150, HC (refd)
Kerajaan Malaysia v Abdul Rahim bin Mohd Aki [1994] 4 MLJU 372, HC (refd)
E
Kerajaan Malaysia v Central Strata Sdn Bhd [2013] 5 MLJ 728; [2013] 8 CLJ 632, HC (refd)
Kerajaan Malaysia v Dato' Haji Ghani Gilong [1995] 2 MLJ 119; [1995] 3 CLJ 161, FC (refd)
Kerajaan Malaysia v Neraca Untung Sdn Bhd [2009] MLJU 521; [2009] 1 LNS 575
F
Kerajaan Malaysia v Ong Kar Beau [2003] 6 MLJ 225, HC (refd)
Kerajaan Malaysia v Rimo Jaya (M) Sdn Bhd [2005] 8 CLJ 303, HC (refd)
NTS Arumugam Pillai v Government of Malaysia [1976] 2 MLJ 72, FC (refd)
Raja Bahadur Kamakhya Narain Singh v Commissioner of Income Tax Bihar and Orissa [1971] AIR 794 (distd)
G
Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri [1999] 3 MLJ 145, CA (distd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (distd)
H
Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163, FC (refd)

Legislation referred to

Federal Constitution arts 3, 13, 121
I
Income Tax Act 1967 ss 91(1), (3), 99, 103(2), (4), (5), (6), 106, 106(1), (3), 142(1), 145(1), (2)(c), Schedule 5, Para 34(1)
Land Acquisition Act 1960 s 40D
Rules of Court 2012 O 14, O 14 r 1

Abu Tariq Jamaludin (Nor Hisham Ahmad and Al Hummidallah Idrus with him)

(Lembaga Hasil Dalam Negeri) for the plantiff.
Muhammad Shafee Abdullah (Muhammad Farhan Shafee and Wee Yeong Kang with him) (Shafee & Co) for the defendant.

Ahmad Bache J:

INTRODUCTION

[1] The plaintiff/Government of Malaysia ('the plaintiff') vide encl (1) has filed a tax recovery action under the Income Tax Act 1967 ('the ITA 1967') against the defendant who was a former Prime Minister and the Minister of Finance of Malaysia, for the payment of additional income tax for the year of assessment 2011 (additional) to the year of assessment 2017 (additional) which are due and payable to date to the plaintiff. The plaintiff, vide encl (6), has made an application to move this court for a summary judgment to be entered against the defendant for the amount sought by the plaintiff. In the early part of the proceeding of this action, the defendant has filed an application, vide encl (11), to move this court for a stay of this proceedings but was rejected by this court. Subsequently, the parties have made lengthy submissions in respect of encl (6) for which is fixed for decision today.

THE LAW ON SUMMARY JUDGMENT

[2] The law on summary judgment as encapsulated in O 14 r 1 of the Rules of Court 2012 ('the ROC 2012') provides, viz:

> *Order 14, Rule 1:*
>
> *Application by plaintiff for summary judgment (O 14 r 1)*
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> *(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part thereof except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.*

[3] It is pertinent to note that under the tax recovery system of this country, as provided for under the ITA 1967, when the proceedings are commenced under O 14 of the ROC 2012, the trite legal principle namely that the defendant has to raise triable issues in order to avoid a summary judgment being entered, does not operate.

[4] Such is the law, is because of the principle of revenue law that when there is a debt due to the government the court shall not entertain any plea whatsoever. This has been expounded in several high authorities, viz, the Supreme Court in the case of *Chong Woo Yit v Government of Malaysia* [1989]

1 MLJ 473; [1989] 1 CLJ Rep 9 which affirmed the principle enunciated in the case of *Government of Malaysia v Abdul Rahman* [1975] 1 MLJ 276 that:

> When proceedings are commenced under O 14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act. Normally when defence raised triable issues it is a rule of law that unconditional leave to defend should be given but under *s 106(3) of the Income Tax Act* it clearly states that in any proceedings commenced by the government under s 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the government the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5). (Emphasis added.)

[5] In view of the decisions of such high authorities to which this court will allude, this court will now analyse and thereafter determine whether summary judgment ought to be entered against the defendant. The plaintiff has argued that this is a clear-cut case where a summary judgment must be entered against the defendant without having to go through a full trial. The defendant has argued, amongst others, that the plaintiff must satisfy the court that the defendant has no defences to the plaintiff's claim. Hence, the defendant has submitted that the defendant needs only to demonstrate that there are triable issues.

ANALYSIS AND FINDING OF THIS COURT

[6] This civil action filed by the plaintiff is to recover the additional income tax due and payable to the government of Malaysia as pleaded in para 3 of the plaintiff's statement of claim. This additional income tax which is due and payable is derived from the additional assessments pursuant to s 91(1) of the ITA 1967 in the amount of RM1,692,872,924.83, of which includes penalties as at the time of filing of the action, through the (additional) notice of assessment dated 20 March 2019 which has been sent to the defendant at his last known address.

[7] The yearly assessments are calculated from the year of assessment 2011 (additional) to the year of assessment 2017 (additional) which are due and payable to the plaintiff upon the service of the aforesaid notices of assessment on the defendant in the amount of RM1,465,690,844 (without the penalties).

[8] The defendant has never denied receiving the said notices of assessment (additional) and in fact has admitted that he has duly received the same, as evidenced in the defendant's affidavit in reply affirmed on 26 August 2019. Furthermore, the fact that the defendant has filed an appeal to the Special Commissioners of Income Tax ('the SCIT') relating to those notices of assessment (additional), through Form Q dated 16 April 2019, and of which

has been received by the plaintiff on 18 April 2019 further reinforced the fact that the said notices are properly served on the defendant in accordance with the provision of ss 145(1) and (2)(c) of the Income Tax Act 1967 (see *Kerajaan Malaysia v Neraca Untung Sdn Bhd* [2009] MLJU 521; [2009] 1 LNS 575). In the case of *Kerajaan Malaysia v Central Strata Sdn Bhd* [2013] 5 MLJ 728; [2013] 8 CLJ 632, the court held, inter alia:

> Section 145(2) provides that a notice relating to tax which is sent by ordinary post shall be deemed to have been served on the day succeeding the day on which the notice would have been received in the ordinary course of post.

(see also the case of *Kerajaan Malaysia v Rimo Jaya (M) Sdn Bhd* [2005] 8 CLJ 303 and *Kerajaan Malaysia lwn Audio Video Solution System Sdn Bhd dan satu lagi* [2017] MLJU 1118; [2017] 1 LNS 1150).

[9] Since the notices of assessment (additional) have been properly served on the defendant (ie 20 March 2019) pursuant to s 103(2) of the ITA 1967, thus, the tax payable under those additional assessments become due and payable to the plaintiff.

[10] Section 103(2) of the Income Tax Act 1967 provides:

> (2) Where an assessment is made under section 90(3), 91, 92 or 96A, or where an assessment is increased under section 101(2), the tax payable under the assessment or increased assessment shall, on the service of the notice of assessment or composite assessment or increased assessment, as the case may be, be due and payable on the person assessed at the place specified in that notice whether or not that person appeals against the assessment or increased assessment.

[11] The plaintiff has submitted, that the defendant has failed to pay the aforesaid outstanding sums. Under s 103(5) of the ITA 1967 such failure to pay within the stipulated 30 days from the date of service of the said notices of assessment (additional) on the defendant, attracts the imposition of a penalty of 10% on each of the year of assessment (additional) of 2011 to 2017, in the amount of RM11,617,337.41, RM32,092,993.23, RM89,157,346.54, RM11,914,465.55, RM1,687,950.00, RM64,344.52 and RM34,647.14 (hereinafter referred as 'the 10% increase') respectively added on the total outstanding sum of which remains unpaid to date.

[12] Thus, this court, therefore holds that the imposition of such penalty under s 103(5) of the ITA 1967 by the plaintiff through the Lembaga Hasil Dalam Negeri ('LHDN') is permissible by virtue of s 103(5) of the Income Tax Act 1967 which provides that:

> Subject to subsection (7), where any tax due and payable under subsection (2) has not been paid within thirty days after the service of the notice, so much of the tax as is unpaid upon the expiration of that period shall without any further notice being

served be increased by a sum equal to ten per cent of the tax so unpaid, and that sum shall be recoverable as if it were tax due and payable under this Act.

[13] In this respect, this court refers to the relevant case of *Government of Malaysia v Abdul Rahman* [1975] 1 MLJ 276, in which the court held:

> Since the amount was not paid within thirty days, further penalties were added and since that was not paid civil proceedings were brought to recover the tax as a debt due to the government.

[14] Thereafter, the defendant continues to fail to pay the total outstanding income tax together with the aforesaid 10% penalty which has remained to date outstanding beyond the stipulated 60 days, for which the failure to pay within the stipulated period of time has attracted a further increase of penalty of 5% as provided under s 103(6) of the ITA 1967, whereby the amount of RM6,389,535.57, RM17,651,146.27, RM49,036,540.60, RM6,552,956.05, RM928,372.50, RM35,389.48 and RM19,055.92 ('the 5 per cent increase') has been imposed and added respectively to the total amount of tax payable for the years of assessment 2011 (additional), 2012 (additional), 2013 (additional), 2014 (additional), 2015 (additional), 2016 (additional), and 2017 (additional) the total amount of which remains unpaid till to date.

[15] The subsequent increase of 5% penalty is allowed under s 103(6) of the Income Tax Act 1967, which provides as follows:

> Where the tax due and payable has been increased under subsection (5), *any balance remaining unpaid upon the expiration of sixty days from the date* of such increase shall without any further notice being served *be further increased by a sum equal to five per cent of the balance unpaid,* and that sum shall be *recoverable as if it were tax due and payable* under this Act.

[16] The above provision of ITA 1967 is clearly explained in the case of *Kerajaan Malaysia v Ong Kar Beau* [2003] 6 MLJ 225 where the court held, viz:

> ... The scheme of the Income Tax legislation is clearly that, upon service of a notice of assessment on the person assessed, the tax payable under the assessment becomes due and payable at the place specified in the notice, whether or not that person appeals against the assessment. *Failure to pay within the time prescribed would attract the provisions of the penalties provided and penalty imposed can be recovered bv way of civil proceedings as a debt due to the government.*

[17] This court is of the considered opinion that such imposition of penalty on the defendant by the plaintiff, as submitted by the plaintiff, is permissible, and is thus fair because if all the other tax-payers are to be imposed with such penalties upon late payment of the taxes which are due and payable, it is only

fair that the defendant, who is a former Finance Minister and former Prime Minister, be subjected to the same provision of penalty, as everyone stands equal before the law.

[18] Accordingly, this court is satisfied that the additional assessments and the increases raised by the plaintiff against the defendant in this action are in accordance with the provisions of the ITA 1967. The defendant, to date, has failed to pay the total amount of arrears of additional income tax amounting to RM1,692,872,924.83 of which includes all the penalties referred to above.

[19] The outstanding amount of arrears of the additional income tax is confirmed by the issuance of the certificate of indebtedness to the plaintiff dated 5 August 2019 pursuant to s 142(1) of the ITA 1967 hence, of which becomes recoverable as a tax that is due and payable to the plaintiff under the ITA 1967 (see exh HMH 4, affidavit in support).

[20] Section 142(1) of the Income Tax Act 1967 provides:

> (1) In a suit under section 106 the production of a certificate signed by the Director General giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount.

[21] The aforesaid section is expounded in the Federal Court case of *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 where the Federal Court has ruled:

> ... if a suit was brought under *section 106* of the Act a certificate signed by the Director General that the defendant was the person from whom the tax was due and if the certificate gave the amount of the tax to be due, then such a certificate *'shall be sufficient evidence of the amount so due and sufficient authority to give judgment for that amount'*. The amount specified in the certificate was so, consequently *prima facie evidence that the amount claimed by the plaintiff was the amount due from the defendant.*

[22] It follows that the tax becomes due and payable to the government and is recoverable by civil proceeding by virtue of s 106 of the ITA 1967 which provides:

> Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.
>
> ...

A In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsections 103(1A), (3), (5), (6), (7) or (8).

B **[23]** This is affirmed by the Supreme Court in the case of *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473; [1989] 1 CLJ Rep 9 where the Supreme Court held that:

... [2] On service of a notice of assessment on the person assessed, the tax payable C under the assessment becomes due and payable whether or not the person appeals against the assessment and would be recovered by the Government by civil proceedings as a debt due to the Government.

... [3] On such civil proceedings being brought by the Government, the Court unlike the Special Commissioners of Income Tax, has no power to entertain any D plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased.

[24] This necessarily means, on a plain reading, that once the defendant was served with a notice of assessment, the court in a civil proceeding brought by E the government, has no power to entertain any plea that the amount is excessive, incorrectly assessed, under appeal or whatsoever, unlike the Special Commissioners of Income Tax who are the judges of facts

F **[25]** This court will pause for a moment at this juncture. The defendant has put up several purported defences or pleas. The defendant's purported defences are that the assessments are grossly incorrect and without basis for many reasons. The main reasons essentially are that a substantial amount of the income came from donations received from an Arab donor and some of the G purported donations were even returned. Some were received as political donations and the remaining are his own income etc.

[26] The defendant submitted, amongst others, that the amount received by the defendant being donations are not taxable as they are not income within H the definition of 'income' under the ITA 1967. The defendant further argued that s 106(3) does not restrict the power of the court to make an independent judgment of the sums claimed, as the judicial power vested in this court by virtue of art 121 of the Federal Constitution supersedes s 106(3) of the ITA 1967.

I **[27]** However, this court is of the considered opinion that these are all defences and pleas that go to the merit of the assessment, in particular, as to the issue of whether the income received is a donation, or of the defendant's own income, all of which are questions of facts.

[28] From the line of authorities cited above, this court holds that the merits of the assessment which involve questions of facts should be heard by the SCIT as the court is not the appropriate quorum to decide on issues of assessment. The SCIT are judges of facts. Section 99 of the ITA 1967 clearly provides that if a person is dissatisfied with the assessment raised, he or she may appeal to the SCIT, of which the defendant has duly done (the purported defences and pleas of the defendant will be dealt with in detail in the later part of this judgment).

[29] Thus, to recapitulate, under the national tax scheme of Malaysia, of which the defendant is aware, or of which the defendant should have been aware, being the former Minister of Finance, upon the service of the notice of assessment, the tax shall become due and payable — (s 103(2) of the ITA 1967). The certificate issued under s 142(1) is prima facie evidence of the actual amount due and payable which could be recovered through civil proceeding as a debt due to the government (s 106(1) for which the plaintiff is now dutifully executing and of which no one may estop the plaintiff from doing so). Under s 106(3) of the ITA 1967 the court shall not entertain any plea or set a defence that the tax claimed is wrongly assessed, excessive, incorrectly increased, or under appeal, etc. These are all challenges that go to the merits of the appeal and should be decided by the SCIT as they involve questions of facts and not the court.

[30] In the case of *Kerajaan Malaysia v Abdul Rahim bin Mohd Aki* [1994] 4 MLJU 372 the court ruled:

> [1] *Section 106(3) of the Income Tax* provides that in any civil proceedings to recover income tax allegedly due and payable, *the court must close its ears and shut its eyes to any suggestion or indication that the amount claimed is excessive or incorrectly assessed*. The said section has the effect of making the amount claimed conclusively correct and unchallengeable in the civil proceedings to recover it and, consequently, of making the judgment subsequently entered immune from subsequent challenge on the ground that the amount of judgment was excessive or incorrectly assessed.

[31] This position of the law finds support in many other authorities as shown below.

[32] In the case of *Sun Man Tobacco Ltd v Government of Malaysia* [1973] 2 MLJ 163, which was followed in the case of *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29, the Federal Court ruled:

> ... He would nevertheless be bound by the decision of this court in *Sun Man Tobacco Co Ltd v Government Of Malaysia* [1973] 2 MLJ 163 which upheld the view that *by reason of the operation of s 106(3) of the Income Tax Act, 1967, the court, to put it bluntly, had only one function to perform, and that was to give judgment in favour of the Government.*

[33] The court further added as follows:

> To my mind, the learned judge did not err in law in holding that s 106(3) of the Income Tax Act 1967 *prevented him from entertaining the defence set up by the appellant.*

[34] In the case of *Kerajaan Malaysia v Neraca Untung Sdn Bhd* [2009] MLJU 521; [2009] 1 LNS 575, the Court of Appeal ruled that:

> Tax due and payable may be recovered by the appellant by civil proceedings as debt due *under section 106 of the Income Tax Act 1967. In a suit under section 106, the production of a certificate signed by the Director — General of Income Tax giving the name and address of the respondent and the amount of tax due from them shall be sufficient evidence of the amount so due and would be sufficient authority for the court to give judgment for that amount. This is provided for under section 142(1) of the same Act. In the present case the Director — General of Income Tax had issued the said certificate certifying the amount of tax due from the respondent. Therefore, without any reason to the contrary, the court can rely on the said certificate to give judgment for that amount. There is no triable issue in this case.*

[35] In the case of *Government of Malaysia v Abdul Rahman* [1975] 1 MLJ 276 the court ruled:

> *When proceedings are commenced under O 14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act.* Normally when defence raised triable issues it is a rule of law that unconditional leave to defend should be given *but under s 106(3) of the Income Tax Act it clearly states that in any proceedings commenced by the Government under s 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the Government the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5).*

[36] In the case of *Arumugam Pillai v Government of Malaysia* [1980] 2 MLJ 283 the Federal Court ruled that:

> *The tax legislation clearly intends that the tax as assessed should first be paid* and therefore makes provisions that such part of the tax paid as shall be determined at the final 'accounting' to be not due and payable shall be refunded. *This provision of 'pay first and talk afterwards' may be arguably a harsh one but it is an intentional provision of the legislature, having regard to the incidence of tax evasion.*

[37] Further, the Federal Court strongly stated: 'what sympathy there is must be reserved for the innocent, who are made to suffer, along with the tax evaders'.

[38] In the premises, for the above reasons, this court rules that by the operation of s 106 of the ITA 1967, the additional income tax is hereby due and recoverable as debt due to the government, for an amount of

RM1,692,872,924.83 as evident in the certificate of indebtedness issued on 5 August 2019.

[39] There after, sub-s (3) to s 106 of the ITA 1967 is triggered, as envisaged in the many authorities to which have been referred to by this court earlier whereby, firstly, the court cannot entertain any plea regarding the amount of tax sought to be recovered on the ground that they are excessive incorrectly assessed, or calculated, or incorrectly assusssed, under ss 103(4) or (5) of the ITA 1967 as asserted by the defendant. In accordance with decision of the Federal Court in *Arumugan Pillai*, the ITA 1967 permits the court not to entertain any defences or plea set up by the defendant. The provision as expressed by the Federal Court 'pay first talk later' even though harsh, but is an intentional provision of the Legislature because of the high incidence of tax evasion in this country.

[40] Secondly, those pleas of purported defences as raised, or as asserted, by the defendant are questions of facts which are to be referred to and decided by the SCIT

[41] Hence, this trigger the effects or give rise to an absence of meritable defences that may be raised by the defendant. Thus, there exist no triable issues to warrant a full trial. Consequently, the court has no alternative but to enter a summary judgment against the defendant for the amount claimed by the plaintiff. Therfore, an order in terms is herby granted in respect of the plaintiff's statement of claim as per encl (1).

[42] All is not lost for the defendant as the defendant has earlier rightfully filed his appeal under s 99 of the Act to SCIT on 16 April 2019. To exemplify this point, the Federal Court in the case of *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163, held, inter alia, that:

> *It is open to a taxpayer to appeal before the Commissioner of Income Tax (SCIT) and prove that he is not liable to assessment.* The doors of justice are not shut to him merely because the claimant is the Government.

THE DEFENDANT'S FURTHER ARGUMENTS ON THE PURPORTED DEFENCE

[43] For the sake of completeness and clarification, this court will now endeavour to consider the other purported defences and pleas as put up by the defendant. The defendant has raised several constitutional arguments about the legality of s 106 of the ITA 1967 vis a vis arts 13 and 121 of the Federal Constitution.

[44] The defendant argued that s 106 of the ITA 1967 usurps the judicial powers of the court. The defendant has also alleged that this provision contravenes art 121 of the Federal Constitution and is invalid under art 13 of the Federal Constitution (see paras 33–46 of the defendant's written submissions).

[45] In reference to art 13 of the Federal Constitution it provides:

13 Rights to property

(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[46] Article 121 of the Federal Constitution provides as follows:

Judicial power of the Federation

[1] There shall be two High Courts of co-ordinate jurisdiction and status, namely —

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed),

and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

[1A] The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

[47] Section 106 of the ITA 1967 provides:

106 Recovery by suit

(1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

(2) The Director General and all authorized officers shall be deemed to be public officers authorized by the Minister under Subsection 25(1) of the Government Proceedings Ordinance 1956, in respect of all proceedings under this section.

(3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsections 103(1A), (3), (5) or (7).

[48] Looking at the two articles of the Federal Constitution, ie arts 3 and 121, as argued by the defendant, as against s 106 of the ITA 1967, this court is of the considered opinion that there is nothing to support the contention that s 106 of the ITA 1967 usurps the judicial powers of the court. Hence, this court holds that the submission of the defendant in this regard is, with respect, misconceived and is therefore, untenable.

[49] The apex courts, have many times previously dismissed, constitutional challenges with regards to the scheme of tax recovery under the Income Tax Act 1967, particularly as against art 13, whereby the Federal Court has ruled, that there is nothing arbitrary in imposing income tax, for the purpose of raising the national revenue of the country.

[50] For example, the Federal Court in *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29 (FC), has held, that in the context of art 13 of the Federal Constitution, there is indeed nothing arbitrary about imposing income tax for the purpose of raising revenue. It was also decided by the Federal Court that, so long as the method of recovery is laid down by the law, it cannot be challenged, more so when there is a law to provide for an appeal to the SCIT. The relevant passages of the judgment on this point is referred here, viz:

> The major ground of appeal is that the learned judge erred in law on the construction of the term 'in accordance with law' in Article 13(1) of the Constitution of Malaysia. In my judgment this ground is equally untenable. *So far as the power of taxation is concerned, the Constitution recognizes no fundamental right to immunity from taxation and that is presumably the reason why no constitutional protection is provided against the exercise of that power. Taxation is an independent power of the State.* The result is that whenever a competent Legislature enacts a law in the exercise of any of its legislative powers, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking Article 13(1) of the Constitution, however arbitrary the law might palpably be. There is indeed nothing arbitrary about imposing income tax for the purpose of raising revenue.
>
> It is contended for the appellant that he does not complain about taxation as such but about the method of recovery of such tax.
>
> *So long as the method of recovery is laid down by the law, I do not see how it can be challenged.* Indeed, the law does provide for an appeal against taxation to a separate tribunal from which there is further right of appeal to the High Court by way of a case stated.

[51] This court therefore holds that s 106(3) of the ITA does not usurp the judicial power of the court, and does not contravene art 13 of the Federal Constitution as s 106(3) is *merely a method of recovery* which is clearly provided under the law. The power of the court to hear and adjudicate the defendant's plea that the amount of tax under the notice of assessment is excessive, incorrectly assessed, under appeal or incorrectly increased is clearly provided under the law.

[52] The rights of the taxpayer is protected and guaranteed under s 99 of the ITA 1967 by way of an appeal to the SCIT. Subsequently, the tax payer if dissatisfied with the decision of the SCIT may appeal to this court against the decision of the SCIT (see Schedule 5 para 34(1) of the ITA). Therefore, judicial powers still remain vested in this court to determine the correctness of the assessments raised by the plaintiff through the Lembaga Hasil Dalam Negeri. One authority that makes this point crystal clear is the case of *Infra Quest Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2017] 7 MLJ 35.

[53] This process of tax appeal has been recognized by the Federal Court in the case of *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 where the Federal Court has held that the plea of non-compliance of the principle of natural justice must be raised before the SCIT, quoting the Federal Court here, it has said:

> *In place of a Board of Review we now have the Special Commissioners of Income Tax. It is open to a taxpayer to go before them and prove that he is not liable to assessment.* The doors of justice are not shut to him merely because the claimant is the Government, *but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts.*

[54] The defendant further argued and referred this court to the recent Federal Court decision of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 in which the Federal Court reaffirmed that no other body could usurp the powers of the court by virtue of art 121 of the Federal Constitution. This court has thoroughly analysed that authority. For a better understanding of the case, this court refers to the salient parts of the judgment.

[55] In the relevant head notes of the case it reads as follows:

> The appellant in Appeal No 01(f)-47–11–2013(B) ('the appeal') and the applicants in Reference No 06–3–05–2013(B) ('the reference') sought to challenge the constitutional vires of the *Land Acquisition Act 1960 ('the LAA')*, made by way of the *Land Acquisition (Amendment) Act 1997 ('Act A999')*. The appellant and the

applicants filed objections against the land administrator's award disputing the amount of compensation awarded arising out of the acquisition of part of their land. The appeal and the reference focused on the changes made to the LAA by Act A999, in particular *s 40D* which empowers assessors sitting with the judge in the High Court to make the final determination on the amount of reasonable compensation for the acquisition of land under the LAA; and *sub-s 40D(3)* and the proviso to *sub-s 49(1) which preclude appeals against the High Court decision on the amount of compensation.*

The appellant was the registered proprietor of a piece of land. The appellant commenced construction works on part of the land to build a total of 128 units of factory lots and three pieces of vacant land to be sold separately as industrial plots. However, part of the appellant's land was subjected to acquisition under the LAA for the purpose of constructing the Kajang-Seremban Highway. The land administrator conducted an enquiry pursuant to *s 12 of the LAA* to determine the amount of compensation payable to the appellant arising from the said acquisition. The appellant was awarded compensation in the sum of RM20,862,281.75 for the value of the land acquired and compensation for the loss suffered from the termination of the project. The appellant objected to the amount of compensation awarded by the Land Administrator by filing Form N requesting the land administrator to refer the matter to the court for its determination pursuant to *s 38 of the LAA.*

...

The High Court Judge hearing the land reference sat with two assessors to determine the adequacy of the compensation payable to the appellant. After hearing the evidence and submissions of parties, the Land Reference Court agreed with the award of the land administrator in respect of the valuation of part of the land acquired by the state.

[56] The Federal Court amongst others has held that s 40D of the Land Acquisition Act('the LAA') is unconstitutional as it usurps the power of the court as it gives the assessors the power to make the decision on the amount of compensation to be awarded and not the judge. This was what the court held:

(1) The right to acquire, hold and enjoy property is a fundamental right guaranteed by the Constitution. However, it is not an absolute right since ownership of property is subject to what is provided for in the Constitution. One's property can be acquired by the State, in accordance with law. The Constitution safeguards the landowner's right to receive adequate compensation as a result of his land being acquired, as specifically provided under *art 13(2)* (para 27).

(2) *Section 37 of the LAA* provides an aggrieved party the legal right to object to the award of the Land Administrator by way of a land reference to the High Court. Prior to 1984, *s 42 of the LAA* contained provision for assessors to aid the judge on the issue of compensation. However, the role of assessors in the Land Reference Court was completely removed vide *Act A575* which came into force on 20 January 1984. Subsequently, by *Act*

A999, the role of the assessors was restored. The ordinary role of assessors has been broadened by *s 40D of the LAA from being advisors to that of fact finders and adjudicators. The section empowers the assessors to decide on the amount of compensation to be awarded arising out of the acquisition and the decision made under sub-s 40D(3) of the LAA is final and non-appealable (paras 28, 31, 32, 33, 35, 49).*

(3) Under *art 121(1) of the Constitution*, the judicial power of the court resides in the Judiciary and no other. There is always a strong presumption in favour of the constitutionality of provisions in a statute based on the principle that Parliament cannot be presumed to intend an unconstitutional action. The burden is upon him who challenges the provision to show that they are unconstitutional. Hence, by virtue of *art 121(1) of the Constitution, the power to award compensation in land reference proceedings is a judicial power that is vested in the High Court Judge sitting in the Land Reference Court (paras 86, 93 & 98).*

(4) Further, the act of determining the amount of compensation payable arising out of land acquisition cases involves judicial assessments. Hence, the power to award compensation in land reference proceedings is a judicial power that should rightly be exercised by a judge and no other. Therefore, a non-judicial personage (ie, a non-member of the judicature) has no right to exercise judicial power. The discharge of judicial power by non-qualified persons or non-judicial personages renders the said exercise ultra vires *art 121 of the Constitution* (paras 100, 101 & 105).

(5) *Section 40D of the LAA* provides that 'the amount of compensation to be awarded shall be the amount decided upon by the two assessors' and thus, imposes on the judge a duty to adopt the opinion of the two assessors or elect to concur with the decision of either of them if their decisions differ from each other in respect of the amount of reasonable compensation arising out of the acquisition. A High Court Judge cannot come to a valuation different from that of the assessors or different from either one of them. *Section 40D* of the LAA, therefore, effectively usurps the power of the court in allowing persons other than the judge to decide on the reference before it (paras 49, 50 & 52).

(6) Within the ambit of *art 13* and *121 of the Constitution*, the premise of a constitutional challenge is *art 4(1) of the Constitution*. By virtue of *art 4(1) of the Constitution*, this court may hold the provisions of any law passed after Merdeka as void and of no effect if such laws are inconsistent with the Constitution. Hence, *s 40D of the LAA* was held to be ultra vires the Constitution and it should be struck down (paras 112, 113 & 115).

[57] In light of the judgment of the Federal Court above, this court holds that the *Semenyih Jaya's* could easily be distinguished with the present case. It can clearly be seen that in that case, the Federal Court has held that s 40D of the Land Acquisition Act 1960 ('the LAA') indeed usurps the power of the court and hence unconstitutional, as the decision pertaining to the amount of compensation to be awarded on the land acquisition are made by the assessors

and not by the judge and cannot be challenged by the court. The judge could only elect to concur with the decision of the assessors. A

[58] Contrary to the present case, the correctness of the assessments is appealable to the SCIT, and on further appeal, is to be decided by the High Court, as alluded to earlier. Thus, the issue that the High Court has no power to deal with the issue of assessment does not arise, and is therefore misconceived. Therefore, the dispute on the assessment could be dealt with by the court once the matter has been decided by the SCIT, by way of an appeal. B

C

[59] This proposition of the law is in fact reinforced in the case of *Infra Quest Sdn Bhd*, where the SCIT has earlier made a finding, inter alia, that the telecommunication towers, owned by the appellant/tax payer's company are not 'plants'. Hence, the taxpayer company/appellant is not entitled to the capital allowance. On appeal to the High Court, the High Court overruled the findings of the SCIT and gave judgment in favour of the appellant and that decision is affirmed by the Court of Appeal. D

[60] The case of *Infra Quest* has also reaffirmed the position of the law that in income tax cases, the court still retains the judicial power and has the final say, so to speak, contrary to the assertion made by the defendant. Hence, the submissions of the learned counsel for the defendant that s 106(3) of the ITA 1967 is unconstitutional as it usurps the power conferred on the court and in contravention with art 121 are, with respect, misconceived, and cannot hold water, so to speak. E F

[61] Furthermore, if this court is to entertain on the correctness of the assessment at the recovery stage as argued by the defendant, this would prevent the SCIT, who are judges of facts, from deciding the same question as they would regard themselves as bound by the decision of the High Court at the recovery stage itself. In order to avoid any inconsistency, the Federal Court in the case of *Kerajaan Malaysia v Dato' Haji Ghani Gilong* [1995] 2 MLJ 119; [1995] 3 CLJ 161 has held that the issues pertaining to facts (including limitation period) must be dealt with by the SCIT, and any decision by the SCIT that is in conflict with the order of summary judgment, the order of the SCIT must prevail. In other words, the final decision of the SCIT on the assessment will affect the final amount to be paid by the taxpayer. The relevant passage in the case of *Ghani Gilong* on this issue is as follows: G H

> If counsel for the taxpayer were correct in his contention that the plea of limitation based on *sub-ss 1 and 3 of s 91 of the Act* is available to him in proceedings for recovery of tax brought in court as well as in proceedings before the Special Commissioners, then a decision by the High Court on the question of limitation would prevent the Special Commissioners from deciding the same question as they would regard themselves as bound by the decision of the High Court thereby I

A abdicating their fact finding function of determining whether there has been fraud or wilful default within the meaning of sub-s 3(a) of s 91 of the Act. Alternatively, even if the Special Commissioners do not regard themselves as so bound, it could lead to inconsistent decisions by the High Court and the Special Commissioners on the identical question of limitation. These would not be reasonable results and, what is unreasonable, cannot be the law.

B

...

we are of the view that the result of such appeal before the Special Commissioners (unless reversed on further appeal), being in conflict with the order for summary judgment, must override the order for summary judgment. We say so because the Special Commissioners are the judges of fact, and have the jurisdiction to consider not only a plea of limitation based on *sub-ss 1 and 3 of s 91 of the Act* but also other issues such as whether the amount of tax sought to be recovered is *excessive, incorrectly assessed or incorrectly increased, all of which are issues which the court in proceedings for recovery of tax by suit is prohibited by s 106(3) of the Act from entertaining.*

C

D

[62] The defendant has also argued that the assessments are statute-barred, and that the plaintiff failed to plead fraud, willful default, or negligence, under s 91(3) of the Income Tax Act 1967 for the years of assessment 2011 to 2013 in the statement of claim.

E

[63] It is germane to note on the issues of fraud/willful/default/negligence under s 91(3) of the ITA 1967 and on limitation period, they are all issues of facts. This court opines that such issues are to be decided by the SCIT being judges of facts. Referring to the case *Kerajaan Malaysia v Dato' Haji Ghani Gilong* [1995] 2 MLJ 119; [1995] 3 CLJ 161 the Federal Court has said:

F

In our view, the High Court has *no power* to entertain a plea of limitation under sub-ss 1 and 3 of s 91 of the Act advanced by a taxpayer. However, the Special Commissioners have such power.

G

...

If the plea of limitation based on sub-ss 1 and 3 of s 91 of the Act is available to him in proceedings for recovery of tax brought in court as well as in proceedings before the Special Commissioners, then a decision by the High Court on the question of limitation would prevent the Special Commissioners from deciding the same question as they would regard themselves as bound by the decision of the High Court thereby abdicating their fact finding function of determining whether there has been fraud or wilful default within the meaning of sub-s 3(a) of s 91 ofthe Act.

H

I **[64]** Hence, this court holds that the plaintiff has no obligation to plead fraud, willful default or negligence by the defendant in the statement of claim under s 91(3) of the Income Tax Act 1967 since these are issues not within the power of this court to decide. It is clear from the above decision that the SCIT is conferred with the jurisdiction to hear issues on the limitation period, and

any other questions which involve facts.

[65] It follows that the two cases referred to by the defendant's counsel ie *Government of Malaysia v Gan Chuan Lian and another action* [1992] 1 MLJ 449; [1992] 2 CLJ Rep 424 and *Government of Malaysia v Ng Song Choon* [1975] 1 MLJ 131 should not be a binding precedent with regards to the issue of limitation and other issues regarding facts. Further, *Ghani Gilong's* decision was decided after both decisions. Be that as it may, a summary judgment order was still entered against the defendant by the Federal Court despite the fact that the two cases were brought to the attention of the court.

[66] Further, the Federal Court in the case of *NTS Arumugam Pillai v Government of Malaysia* [1976] 2 MLJ 72 has held that the issue of whether or not to plead any default in a time barred cases is immaterial due to the operation of s 106 of the ITA 1967. The court in that case held:

> In our judgment limitation as such does not apply to any proceedings by the government for the recovery of any tax. This would seem clear from the proviso to *s 33(1) of the Limitation Ordinance 1953*. Reading *s 91 of the Income Tax Act 1967* as a whole it would seem clear that, quite apart from any form of fraud, the words 'within twelve years after its expiration' are irrelevant where there has been any willful default on the part of a taxpayer in disclosing part of his income for any particular year of assessment.
>
> *It was contended for the appellant that there was no allegation of wilful default the affidavit* in support of the plaintiff's application under *O 14*. But the fact that additional assessments were made for the years of assessment 1953 and 1958 was sufficient to indicate such default. *In any event, s 106(3) of the Income Tax, 1967 provides that 'in any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5)'.* In the circumstances the learned judge had no power to entertain any of the pleas raised before him by the appellant in opposing the plaintiff's application for leave to sign final judgment.

[67] In another Supreme Court case of *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473; [1989] 1 CLJ Rep 9, a summary judgment was entered against the taxpayer despite there was an argument with regards to the issue on limitation. The Supreme Court held:

> On service of a notice of assessment on the person assessed, the tax payable under the assessment becomes due and payable whether or not the person appeals against the assessment and would be recovered by the government by civil proceedings as a debt due to the government. On such civil proceedings being brought by the government, the court, unlike the Special Commissioners of Income Tax, has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased.

[68] The defendant did argue earlier that the amount are not taxable as inter alia, it was wrongly assessed, wrongly calculated 'etc'. This court opined that the answer lies within the scope of s 106(3) of the ITA 1967 itself. Again, this court has to reiterate that those are facts. Such issues on incorrect calculation under assessment are not within the power of the High Court at the recovery stage. These are issues to be dealt with by the SCIT as it revolves on the questions of facts. Again, if this court is to decide on the issue on whether or not the amount received by the defendant is subject to tax, or is wrongly calculated, this will preclude the SCIT, who are the judges of facts, from deciding the same questions as they would regard themselves as bound by the decision of the High Court at the recovery stage as decided by the Supreme Court in *Dato' Haji Ghani Gilong*'s case.

[69] This court also observed that the defendant has also raised the same argument in their notice of appeal filed before the SCIT.

[70] The defendant also argued earlier that the defendant might not even be liable to pay the taxes after all because those are not his income. To this, this court would like to refer to the case of *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163, where the taxpayer argued that there is no liability to pay, and therefore s 106(3) of the ITA 1967 was not applicable. In rejecting the argument of the taxpayer, the Federal Court again has held that, if the taxpayer wishes to dispute the amount of tax claimed against him, he needs to bring his case to the SCIT. The court held:

> The above passage would appear to support the contention of the appellant in this instant suit that s 106(3) of the ITA 1967 does not apply to a case where the taxpayer contends that no tax whatever is due by him. I regret I am unable to agree with that. In my opinion the learned judge, was right in this instant case where he said that if the taxpayer wished to dispute that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5) he has to do so by way of appeal to the Special Commissioners. That opinion would appear consistent with the scheme of the Income Tax legislation. It is only in relation to any disputes on questions of law at the hearing before the Special Commissioners that the matter can be brought to the High Court by way of a case stated.

[71] This court has also analysed the two cases referred to by the defendant, namely the case of *Raja Bahadur Kamakhya Narain Singh v Commissioner of Income Tax Bihar and Orissa* [1971] AIR 794 and *Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri* [1999] 3 MLJ 145. This court rules that those are not tax recovery cases but a case that had already being decided through an appeal process *before the Commissioners or SCIT*. Therefore, these authorities are not relevant for the tax recovery cases.

CONCLUSION

[72] For the elaborate reasons given at length above, and in the premises, this court holds that a summary judgment is entered against the defendant for the amount claimed by the plaintiff as in the plaintiff's statement of claims, that is RM1,692,872,924.83 with cost. Hence, an order in terms is granted to encl (1), order accordingly.

Application allowed.

Reported by Ashok Kumar